PARTIES BELOW

The parties to the three consolidated appeals b

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomc

Appellees: Heinold Commodities, Inc. ("Heinold son & McKinnon Auchincloss Kohlmeyer Inc. son"), Clayton Brokerage Co. of St. Louis, Mercantile Exchange ("Exchange"), Richard Howard Gabler and Alfred Pennisi.

No. 79-7464

Appellant: Incomco,

Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., Willia ter, Jr., Willard C. Shiner, Eugene P. Weisma Welts, Raymond Rothberg, Arthur S. Armstrong, Brinek, Capgain Holdings, Inc. and Heiz Romm

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judgm 79-7402 and No. 79-7482. Heinold and Thomson parties to the appeal in No. 79-7464.

Heinold and Thomson are corporations. A listi parent companies, subsidiaries and affiliates a their Joint Petition for a Writ of Certiorari to t States Court of Appeals for the Second Circui No. 80-936.*

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*The following abbreviations are sometimes used in th "CEA" for the Commodity Exchange Act, as amended § 1 *et seq.*); "CFTC" for Commodity Futures Trading C "FCM" for futures commission merchant. The decision below, *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980), is as *Leist*. The page numbers to the majority and dissenti used in this brief are the page numbers appearing in the Jo dix (J.A.). *Rivers* v. *Rosenthal & Co.*, No. 79-1313 (5t 16, 1980), is referred to as *Rivers*. The page numbers to opinion used in this brief are the page numbers appear Joint Appendix to Supplemental Briefs in Support of P Writs of Certiorari to the United States Court of Appe Second Circuit filed by all petitioners in these consolid (J.A.S.).

QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for dam ages against commodity brokers under the following pr visions of the Commodity Exchange Act:

(i) Section 4a which authorizes the Commodi Futures Trading Commission, formerly the Co modity Exchange Commission, to set speculative tra ing and position limits for specific commodity futur contracts and which makes it unlawful to exceed tho limits;

(ii) Section 4b which makes it unlawful for a me ber of a commodity exchange to "cheat or defraud" h customers; and

(iii) Section 9(b) which makes it a felony for a person "to manipulate . . . the price of any commodi in interstate commerce, or for future delivery on subject to the rules of any contract market, or to corn . . . any such commodity . . ."

despite expressly providing many judicial and administr tive means of enforcing these provisions including crimin penalties, civil fines and an administrative remedy f respondents' claims.

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No. 80-936

(Consolidated with Nos. 80-757 and 80-895)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., *Petitioners*

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO, *Respondents*

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., *Petitioner*

v.

NATIONAL SUPER SPUDS, INC., *et al.*, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS HEINOLD COMMODITIE INC. AND THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.

OPINIONS BELOW

The opinions of the Court of Appeals majority and d sent (J.A. 83-249) are reported at 638 F.2d 283 (2d C 1980). The opinion of the District Court (J.A. 60-77), wh judgment was reversed by the Court of Appeals, is repor at 470 F.Supp. 1256 (S.D.N.Y. 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1980. The Court of Appeals denied petitioners' timely petitions for rehearing and suggestion for rehearing en banc on September 9, 1980. This Court granted these petitioners' timely Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 4a, 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6a, 6b and 13(b)), and article I, section 1 of the United States Constitution are set forth in these petitioners' Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Article I, section 7, clause 2 and article III, section 1 of the United States Constitution are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

These cases arise out of trading in May 1976 Maine potato futures contracts ("May Contracts") on the Exchange during March, April and May 1976. Petitioners are commodity brokers. As required by law, they are registered as "futures commission merchants" with the CFTC.

Respondents are traders who held long positions in May Contracts which were liquidated prior to the close of trading on May 7, 1976. All of these respondents are admittedly "speculators" as distinct from "hedgers," the latter being persons who produce, use, handle or merchandise a particular commodity. None of the respondents was a customer of these petitioners with respect to the purchase of their "long" contracts. Indeed, petitioners acted as brokers for persons on the opposite side of the market from respondents ("short sellers").

976, the CFTC commenced an investigation of in May Contracts and the failures in delivery contracts. This investigation led to administra- ings against certain short sellers and agents their brokerage firms, the Exchange and var- who traded from the long side of the market.[1] short brokers who are petitioners in this Court d with any violation of the CEA by the CFTC.[2] ases in which these petitioners are defendants with violations of Sections 4a, 4b and 9(b) . Section 4a, which was enacted in 1936, au- CFTC to set speculative trading and position mmodity futures contracts and makes it unlaw- d those limits. Section 4b, which also was en- 6, makes it "unlawful to cheat or defraud" a connection with the making of futures con- ion 9(b) prohibits any person from manipulat- e of or cornering any commodity in interstate r for future delivery on or subject to the rules nodity exchange. This language was added in ion 9 of the Grain Futures Act of 1922. All three criminal provisions.

hese sections, nor any other provision of the ssly authorizes the institution of damages ac- aders in the federal courts. Moreover, unlike es Exchange Act of 1934, the CEA contains no nt of jurisdiction to the federal courts to hear s.

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tter of Peter J. Taggares et al., CFTC Docket No. *Matter of the New York Mercantile Exchange*, CFTC 7-14; *In the Matter of Harold Collins et al.*, CFTC 7-15.

o. 95-1181, 95th Cong., 2d Sess. 98-99 (1978) contains tion of the "Maine Potato Case."

e CEA does, however, expressly provide for fines and sonment in criminal prosecutions, and for numerous judicial and administrative means of enforcing these sions. Among those means, enacted in 1974, is an istrative proceeding before the CFTC for the redress y person's claims or grievances against FCMs such as oners. Respondents' claims for damages against the oners could have been presented and adjudicated in such ministrative proceeding.

e District Court granted these petitioners' motions for ary judgment on the counts in the complaints which e violations of Sections 4a, 4b and 9(b) of the CEA. espondents appealed and, over the vigorous and well- ned dissent of Judge Mansfield, the Court of Appeals sed.[3] This Court granted petitioners' timely Joint ion for a Writ of Certiorari on February 23, 1981.

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reaching its decision, the District Court applied the test iated in *Cort* v. *Ash*, 422 U.S. 66 (1975), and applied in *Can-*. *University of Chicago*, 441 U.S. 677 (1979). The District did not have the benefit of this Court's decisions in *Trans-ca Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *e Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). The District held that no private right of action against brokers existed se "two critical elements of the [*Cort* v. *Ash*] test, congressional and consistency with the statutory scheme, weigh strongly t the implication of such a right." (J.A. 72).

SUMMARY OF ARGUMENT

icle I of the Constitution, federal law is made
nactment of Congress. For this reason, the ju-
os its constitutional role when, as did the court
nterprets" an unambiguous statute to create
mages clearly omitted from the text of the
even if the judiciary considers legislative intent
y structure, this Court's decisions in *Touche*
v. *Redington*, 442 U.S. 560 (1979), and *Trans-*
rtgage Advisors, Inc. v. *Lewis*, 444 U.S. 11
e clear that a right to damages can be im-
statute only if the proponent of the right can
convincingly that Congress affirmatively in-
eate the right which it failed to express in the

a, 4b and 9(b), which were enacted in 1936,
ot create a right to damages in private parties.
lly prohibit "cheat[ing] or defraud[ing]" of
nanipulation of the commodity markets, and
speculative trading, carrying criminal sanctions
lation. The text of these provisions is strikingly
206 of the Investment Advisors Act of 1940,
merica construed not to permit private suits
. Indeed, there is less reason for implication in
ecause speculators like respondents are not the
eficiaries of Sections 4a, 4b and 9(b).

ative history of the 1936 Act provides no evi-
Congress intended these general prohibitions to
le in private damages actions. Furthermore, the
the Securities Exchange Act of 1934, contains
grant of jurisdiction to the federal courts to
ch actions.

ant to the intent of Congress
nts to the CEA in 1974 provide
ngress did not intend to create
. That Act confers awesome en-
newly-created federal agency,
letailed, express administrative
Act. When it adopted this ad-
ess considered and rejected a
ovided a right of action for
rts. This rejection, under this
l *Railroad Passenger Corp.* v.
Road Passengers (*"Amtrak"*),
bstantial indicia" of intent not

ored the text of the statute
n 1936. It concluded that the
ne CEA with knowledge and
ction implying a right of action
he canon of statutory construc-
f a statute incorporates a pre-
erpretation, the majority in-
question was not whether Con-
o create a new private right
whether petitioners could make
owing" that Congress intended
n. (J.A. 146). But the statute
re-enacted in 1974. Also, the
re, as here, the amended statute
Lorillard v. *Pons*, 434 U.S. 575
ns in question were by no means
construction. Only a small num-
red the question of an implied
m relied entirely on one district
learly incorrectly decided even
pronouncements of this Court.

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175 U.S. 414, 419 (1899).

In the present case there is
doubtful meaning to be construe
single word in any of Sections 4
that Congress intended to crea
for damages.

**D. Under the Constitution, th
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Whether Congress Create**

Under articles I and III of t
statute is a failure to legislate w
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to give expression to that intent
may nonetheless be given effe
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This assumes that if Congres
a damages remedy, even if it did
the courts may treat as *done* wh
But articles I and III explicitl
and how to do it; and it is err
court determines Congress only
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E. The Tests Laid Down in *Cort* v. Logical Basis Under the Constitut the "Implication" of a Private Ri Damages Not Explicitly Enacted b

Cort v. *Ash*, 422 U.S. 66 (1975), advan as to how under our Constitution a right ages could be declared by the courts the express enactment of such a right Instead, it merely assumed the existence

> "In determining whether a private in a statute not expressly providing are relevant." 422 U.S. at 78.

These "several factors" are at best c interpreting the intent of the language as this Court has recently made clear. not square the result they are intended t requirements of the constitutional sepa

The first factor: whether the plaintiff i for whose *especial* benefit the statute rives solely from *Rigsby* and merely the outmoded and logically insufficient '

The second test: whether there is "any lative intent, explicit or implicit, either to edy or to deny one," merely assumes legislate can be regarded as the equivale proposition which, correctly stated, defe

The third test: whether it is "consiste lying purposes of the legislative schem remedy," implies that the court may legi if what it creates is "consistent" with tually enacted. This would be an open i unlimited judicial legislation.

The fourth test is a negative one: wh cause of action is a matter in an area ba of the states. But if it were basically

federal government, that in itself would not justify a
ference that Congress intended to do something abou

Thus, obviously not a single one of the *Cort* tests
explain how a court, consistent with the Constitution,
assume that Congress did enact a cause of action for
ages without making this fact explicit and clear in the a
language it enacted—that is, in the "four corners of
Act" as *Amtrak* insisted be done.

II. IF IMPLICATION OF UNEXPRESSED PRIV RIGHTS OF ACTION FOR DAMAGES IS CON TUTIONALLY PERMISSIBLE, THE PROPER T FOR SUCH IMPLICATION IS THAT SET FO BY THIS COURT IN SUCH RECENT DECISION *TRANSAMERICA, REDINGTON, AMTRAK SIPC*: A RIGHT MAY BE IMPLIED ONLY W THE PROPONENT OF THE RIGHT MAKE CLEAR AND UNAMBIGUOUS SHOWING AFFIRMATIVE CONGRESSIONAL INTENT CREATE IT.

Even if a right of action for damages could constitutio
be implied in the absence of express statutory language,
erence to the doctrine of the separation of powers requ
that such a right be implied only when the evidence of
gressional intent is clear and unequivocal. As Justice Po
wrote in *Cannon*, 441 U.S. at 731: "Absent the most
pelling evidence of affirmative congressional intent, a fed
court should not infer a private cause of action."

The "central inquiry" and "dispositive question"
therefore, whether Congress clearly intended to mak
private right of action for damages available to a spe
class of litigants. *Redington*, 442 U.S. at 575; *Transame*
444 U.S. at 23. If the "dispositive question . . . whe
Congress intended to create any such remedy" is answ
in the negative, the "inquiry is at an end." *Id.* at 24.

Those who contend that "'a statute has endowed them h a cause of action must establish their proposition,' their failure to demonstrate Congress' intent to provide ause of action compels the denial of such actions." *Rivers Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980) A.S. 16a); *Leist* (J.A. 177) (Mansfield, J., dissenting).[7] Express statutory provision of other judicial and admin-rative means of enforcement is strong evidence that Con-ess did not intend to create an unexpressed private damages nedy. *Transamerica*, 444 U.S. at 20; *Redington*, 442 U.S. 574; *Securities Investor Protection Corp.* v. *Barbour*, U.S. 412, 419 (1975); *Amtrak*, 414 U.S. at 458; *Botany orsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); nnon, 441 U.S. at 749 (Powell, J., dissenting). Where, here, these express means of enforcement are broad in ope and detailed in nature, there is even less "justifica-on for implying an unmentioned additional private rem-y." *Leist* (J.A. 182) (Mansfield, J., dissenting). *See ransamerica*, 444 U.S. at 20; *Redington*, 442 U.S. at 571-72; *mtrak*, 414 U.S. at 458.

Application of these principles in these cases leads to e inescapable conclusion that Congress did not create ghts of action for damages for the alleged violations of ections 4a, 4b and 9(b).

II. THE TEXT AND LEGISLATIVE HISTORY OF THE 1936 ACT PROVIDE NO EVIDENCE THAT CONGRESS INTENDED TO CREATE A CAUSE OF ACTION FOR DAMAGES FOR VIOLATION OF SECTIONS 4a, 4b AND 9(b).

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[7] This Court has made clear that even when an implied private emedy is available under a specific statutory provision, it is not neces-arily available to all classes of plaintiffs under the same provision or vailable to anyone under other provisions of the statute. *Redington*, *upra*; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Santa Fe Industries, Inc.*, v. *Green*, 430 U.S. 462 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

e Text of Sections 4a, 4b and 9(b) Does Not en Hint That These Provisions May Give Rise Civil Liabilities.

t has made plain that "[t]he starting point in volving construction of a statute is the language s Court has also made clear that if the statutory ich is alleged to give rise to an unexpressed civil ot drafted with "an unmistakable focus on the ss," or if the provision simply "create[s] duties f persons for the benefit of the public at large," le reason to infer that Congress intended to vate right to damages on individuals. *Cannon,* 91, 692 n.12; *Universities Research Association, u,* No. 78-1945, slip op. at 17 (U.S., April 6, *Redington,* 442 U.S. at 569.[9] None of the sec- CEA relied on by respondents in these cases vith "an unmistakable focus on the benefited eed, each of the sections was enacted for the protection of the general public, not for the particular group. *See* Judge Mansfield's dissent 208.

makes it unlawful for brokers in or in connection "for or on behalf of any other person . . . (A) to

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rnst v. *Hochfelder,* 425 U.S. 185, 197 (1976); *Trans-* J.S. at 16; *Redington,* 442 U.S. at 568; *Southeastern ollege* v. *Davis,* 442 U.S. 397, 405 (1979); *Cannon,* 89.

e Congress clearly intended to impose duties for the ticular class of persons, however, the question whether intended to create a private right in those persons nswered. *Transamerica,* 444 U.S. at 17-18 ("Indeed, lative history leaves no doubt that Congress intended rceable fiduciary obligations. [citations] But whether ded additionally that these provisions would be enforced e litigation is a different question."); *Coutu,* slip op. *is* v. *Passman,* 442 U.S. 228, 241 (1979).

cheat or defraud . . . such other person . . ." (B) willfully to give "such other person any false report . . . or (C) willfully to deceive . . . such other person." (7 U.S.C. §6b). The offense thus exists only when the broker cheats or defrauds *his* customer. Nowhere does the section mention parties having no connection with the contract. In face of this language, no possible claim can be made that respondents, non-customers of these petitioners, were members of the class for whose especial benefit this provision was enacted. See Judge Mansfield's dissent at J.A. 192-96.

Section 9(b) makes it a felony "for any person to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market or to corner . . . any such commodity." (7 U.S.C. §13(b)). As Judge Mansfield points out in his dissent:

> ". . . §9(b), like §4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. . . . [T]here is not the slightest suggestion in the language or legislative history of §9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act." (J.A. 207-08).

Similarly, Section 4a is a general prohibition against excessive speculation in futures trading. This provision was surely not intended as a special protection for those same speculators against whose activities it was directed. *Liang* v. *Hunt*, 477 F.Supp. 891, 893 (N.D. Ill. 1979) ("The legislative history provides no mention of any remedy nor any intent to benefit speculators"). *See Piper*, 430 U.S. at 37; *Santa Fe Industries, Inc.*, 430 U.S. at 478. As Judge Mansfield wrote in his dissent:

as ever found a private cause of action to
4a. The section serves as a general prohibi-
excessive speculation in commodity futures
in language of the section, then, indicates
designed for the protection of the general
is there any suggestion that Congress in-
nfer any private right of action upon any
lone a speculator, who might be claimed to
as a consequence of a violation of the sec-
207-08 n.8).

ections simply proscribes certain conduct.
ctions in terms creates or alters any civil
merica, 444 U.S. at 19.

pinion attempts to show that although the
Congress was to restrict those speculators
he grain trade to the detriment of the pro-
onsumer" (J.A. 130), Congress had grad-
that "speculators" also deserved to be
131-35), and hence were within the class
traders" intended to be "specially bene-
). But this has little to do with the 1936
fore the Court. The Court has warned
ing causes of action "to serve what is 'at
purpose' of the federal legislation." *Santa*
c., 430 U.S. at 478.

and 9(b) are criminal sections which when
nishable by fines and imprisonment. As early
urt pointed out, with respect to Section 3
Patman Act:

3 contains only penal sanctions for violation
ions; in the absence of a clear expression of
l intent to the contrary, these sanctions
familiar principles be considered exclusive,
supplemented by civil sanctions of a distinct
shville Milk Co. v. *Carnation Company*, 355
7 (1958).

)

shville Milk remains sound law
own, 441 U.S. 281, 316 (1979),

66 (1975), we noted that this
a private right of action under

**) Were Enacted In 1936 and
cord Is Devoid of Any Evi-
Congress Intended These
ed Through Private Damages**

Act, which was enacted in
l be conducted only on ex-
ised or "designated" as "con-
ge failed to comply with the
ignation as a contract market
a Commission could suspend
gnation as a contract market.
the Secretary of Agriculture
ne trading privileges of any
the statute.[11]

he Commodity Exchange Act
t. 1491) which substantially
ct. Sections 4a, 4b and the rel-
of current Section 9(b)[12] were

21, substantially re-enacted as the
nended and renamed in 1936, was
passed the Packers and Stockyards
2 Stat. 159). Section 308 of that
or damages in the federal district

), 6(b); 42 Stat. 999, 1001, 1002

age of current Section 9(b)—"or
manipulate the price of any com-
for future delivery . . . ."—which

at. 1492-97, 1501).
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substantive pro-
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Congress' intent at
974, which must be
ate cause of action
2 U.S. at 575 n.16;
v. *United States*,
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4a, 4b and 9(b) to
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Congress
No. 95-8

**A. The
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U.S.C. §18), the
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Section 14 specifie
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[14] In nearings befo
Forestry, Congress w
ges remedy in the Ac
and H.R. 13113 Befo
Forestry, 93d Cong.,
Schotland). *See also*
Jackson recommendin
because it provided for
chose not to insert su

[15] Under these amen
tion of the Act may

At no point in this scheme has
private right of action for damag
Given the remedies available unde
federal courts, as the District Co
best, unnecessary.

The very enactment of these expr
is strong evidence that such reme
exclusive. As this Court wrote in

> "A frequently stated principle
> is that when legislation expres
> remedy or remedies, courts sh
> age of the statute to subsume
> at 458.

See *Transamerica*, 444 U.S. at 19-2
T.I.M.E., Inc. v. *United States*, 3
Botany Worsted Mills v. *United*
(1929). But other evidence sugge
edies were to be exclusive. Secti
plaints are to be screened by the

(footnote continued from previous page)
FCM for damages. This reparations p
the filing of a "petition" within two y
accrues. The Commission reviews the
and if "in the opinion of the Commiss
action," a copy of the "complaint thu
Commission to the respondent for satis

If the FCM is found to have violate
damages resulting from such violation
award are subject to review by the Co
in the courts of appeal. To perfect an a
a bond in double the amount of the a
including a reasonable attorney's fee fo
award is not satisfied, any person for wh
may, within three years of the date of th
the federal district court in the district i
is located the principal place of business
if an appeal is not taken and the ord
days of the compliance date, the FCM
suspended. *See* 7 U.S.C. § 18.

tions proceeding is commenced. While th
mysteriously reasons that the lack of ar
cedure in court actions is evidence that Co
such actions, the proper inference to be
provision is precisely to the contrary. Wh
have provided for specific procedures i
those procedures could be avoided merel
of an alternate forum? This point is fu
by Section 14 of the CEA which provid
year limitations period applicable to
CEA. If reparations were intended to
to court actions this uniform limitations
meaningless. *See Oscar Mayer & Co.* v. *Et*
763 (1979). In addition, an implied private
inconsistent with the Section 14 requireme
dent of the United States post a bond "bef
tion is taken on his complaint." No such
generally in the federal courts.[16] Similar
quires a losing party to reimburse attorne
costs paid by the prevailing party in enfor
district court. No such award may be en
federal court judgments. Finally, the CFT
rations awards, but of course not judgments
to assure uniformity in the development
governing the futures industry as part of
"to strengthen the regulation of futures t

**B. Congress Considered but Refused
Which Would Have Created a
Action for Damages.**

At the time of the 1974 amendments, C
a bill which would have provided for both

[16]The Court has recognized that such require
protection against "strike" suits and other types
Blue Chip Stamps v. *Manor Drug Stores*, 42
(1975).

damages ("Civil Action for Damages" S. 2837 §505). bill would have created a private right of action in federal courts for parties injured by violations of the Congress rejected this approach in favor of the more det administrative scheme described above. In *Amtrak*, 414 453 (1974), this Court considered legislative history in v a proposed amendment creating an explicit private rig action in the district courts was similarly rejected. Court held that the failure of the Committee to adop proposal was "substantial indicia" that the legislator not intend the final version of the bill to create a pr right of action in the district courts.[17] *Id.* at 460-61.

The majority speculates that Congress failed to adop private right of action provision because of an unwilling to adopt the treble damage provision and because "[s]i damages were recoverable under existing law." (J.A. n.38). This contention seriously underestimates the al of Congress to create legislation that specifically re its intent. ". . . [I]f Congress intends those custome have such a federal right of action, it is well aware of it may effectuate that intent." *Redington*, 442 U.S. at Congress is unlikely to have rejected a provision cre a private right of action if it actually intende

[17] In these cases, the Senate Committee on Agriculture and For which held hearings on H.R. 13113 and the three Senate bills, S. S. 2578, and S. 2837, for eight days during which time it heard 58 witnesses and reviewed written statements from 18 other pa stated in its report that:

> "It . . . considered the differences between the provisio the various Senate bills and the House bills, as well as all an ments which had been submitted by interested parties.
>
> "The Committee proceeded gingerly and with caution efforts to rewrite the legislation regulating such an impo industry as commodity futures trading." S. Rep. No. 93- 93d Cong., 2d Sess. 20 (1974).

Congress' failure to pass the bill creating a private cause of a was clearly a studied omission.

eate such a right of action, especially given the likely inter-
etation of that rejection by the courts in light of the then
cent decision in *Amtrak*. Moreover, if "simple damages
re recoverable under existing law," why would Senator
art have proposed a bill providing a right to such dam-
es?

C. The Plethora of Other Judicial and Administrative Remedies Expressly Provided in the CEA Is Compelling Evidence That Congress Did Not Create an Unexpressed Right of Action for Damages.

The CEA provides not only fines and imprisonment for
olation of Sections 4a, 4b and 9(b) (7 U.S.C. §§ 13(b) and
(c)), but other judicial and administrative means of en-
rcement as well. For example, the CFTC is authorized to
ohibit FCMs such as these petitioners from trading on
y contract market, to suspend or revoke the registration
an FCM, to assess civil penalties of up to $100,000 against
FCM for each violation of the CEA (7 U.S.C. § 9), to
spend or expel from membership in a commodity exchange
otherwise discipline members of a commodity exchange
U.S.C. § 12c(1)(A)), to review, affirm, reverse or modify
tion taken by a commodity exchange against its members
U.S.C. § 12c), to commence suit in the district courts
ainst FCMs and others for a restraining order, an in-
nction or a writ of mandamus (7 U.S.C. § 13a-1), and to
nduct such investigations as it deems necessary to as-
rtain facts regarding the operations of boards of trade
d other persons (7 U.S.C. § 12(a)). Any person complain-
g of any violation of the CEA may commence an admin-
rative proceeding against an FCM to recover damages
th awards enforceable in the district courts (7 U.S.C.
8). See, in addition, 7 U.S.C. §§ 7a(11) and 21(b)(10).
ates are authorized to bring suits in equity and actions
law for injunctive relief, damages or such further and

ef as the court may deem appropriate (7 U.S.C. These are merely some of the enforcement mecha- tained in the CEA. What was said in *Trans-* applies with even greater force in these cases:

> it is an elemental canon of statutory construction where a statute expressly provides a particular ly or remedies, a court must be chary of reading s into it [citations]. . . . Congress expressly pro- both judicial and administrative means for en- ng compliance with § 206. . . . In view of these ss provisions for enforcing the duties imposed by it is highly improbable that 'Congress absent- edly forgot to mention an intended private ac- *Cannon* v. *University of Chicago*, 441 U.S. at 742 ell, J., dissenting)." 444 U.S. at 19-20.

ntrak, 414 U.S. at 452; *Botany Worsted Mills* v. *ates*, 278 U.S. 282, 289 (1929).[18]

1978 AMENDMENTS TO THE CEA PROVIDE THER EVIDENCE THAT CONGRESS NEVER ENDED TO CREATE AN UNEXPRESSED HT OF ACTION FOR DAMAGES UNDER SEC- NS 4a, 4b and 9(b).

, Congress again amended the Commodity Exchange again chose not to make provision for private dam- ons in the federal courts. (Futures Trading Act of . L. No. 95-405, 92 Stat. 865). In the hearings on amendments, Senator Huddleston noted that as of the 1974 amendments the courts were refusing a private right of action under the CEA. 124 ec. 10537 (1978) (remarks of Sen. Huddleston). as the District Court correctly pointed out, Con-

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[18] *Goldman* v. *First Federal Savings & Loan Ass'n of Wil-* F.2d 1247, 1250 n.6 (7th Cir. 1975):

> e statute expressly authorizes proceedings to enforce its ions and the regulations promulgated under it, ordinarily be inferred that no other means of enforcement, such as ivate cause of action, was intended by the legislature. ions]" (per then Judge Stevens.)

despite this criticism, chose not to provide a cause of in the federal courts.[19] Instead, Congress strengthened parations proceedings and expressly authorized State ls to bring injunctive and damages actions in the l courts (7 U.S.C. § 13a-2). Congress expressly pro- the federal courts with jurisdiction over such actions .C. § 13a-2(2)). This express provision for state civil s is, as this Court stated in *Transamerica*, 444 U.S. n.13, "another clear indication that Congress knew o confer a private right of action when it wished so."[20] Equally important was Congress' determina- o assure that such actions would not proceed without ission involvement:

Immediately upon instituting any such suit or action, he State *shall serve* written notice thereof upon the Commission and provide the Commission with a copy of ts complaint, and the Commission shall have the right to A) intervene in the suit or action and, upon doing so, hall be heard on all matters arising therein, and (B) le petition for appeal." 7 U.S.C. § 13a-2(3); emphasis dded.

Congress took steps to guarantee to the extent possible nal uniformity in the development of standards govern- ommodity futures trading.[21]

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lthough the Senate report on the 1978 amendments to the CEA catalogs the protections provided customers under the CEA, con- usly absent is any mention of an implied right of action for ges. S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, 32 (1978); *vers* (J.A.S. 32a).

ee *Alkan* v. *Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) 97 at 23,252 (S.D. Ohio. 1979), citing *Berman* v. *Bache, y, Stuart, Shields, Inc.*, 467 F.Supp. 311 (S.D. Ohio 1979) . . [T]he legislative history of the 1978 amendments implies gly that no private cause of action exists."). *See also Bartels* v. *ational Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977).

ee H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 14, 16 (1978).

(footnote continued on next page)

**RITY ERRED IN RULING THAT, BE-
IGRESS IN 1974 FAILED EXPRESSLY
L THE CAUSE OF ACTION FOUND TO
D IN CERTAIN PROVISIONS OF THE
NUMBER OF LOWER COURTS, IT *SUB*
APPROVED AND ADOPTED THESE
S DECISIONS.**

ompletely ignores the principles governing
ivate remedies established by this Court.
ity erroneously chose to rely on the "canon
truction that the reenactment of a statute
eding judicial interpretations," citing *Van
ering*, 115 F.2d 709, 710 (2d Cir.), *cert.*
585 (1940), and several other irrelevant
144).

ontends that Congress was aware in 1974
er federal courts had implied a private
r damages in several provisions of the CEA
s' failure in the face of these decisions to
e enunciated therein is evidence of an in-
to approve and adopt the rule. (J.A. 127-
er these circumstances, the majority would
tioners here an "exceedingly strong show-
n to abolish the private cause of action for
ion and violations by exchanges that had
recognized in order to justify a conclusion
gress' intent." (J.A. 146).

from previous page)
o Congress of assuring a nationally uniform body
ner emphasized by its refusal to permit the States
State courts under State statutes identical to the
ge Act:

ittee was concerned that, despite safeguards in the
ility existed that in time there would be separate
e court decisions among the various States that
nfusion and disruption among the regulated per-

utory construction, the pre-
ption of prior judicial in-
s helpful in resolving ambi-
rom conclusive. This Court
"the doctrine of legislative
n auxiliary tool for use in
y provisions." *Jones* v. *Lib-*
3-34 (1947).[22]

out in his dissent (J.A. 246-
majority do not support its
circumstances of these cases.
ed private rights of action.
ply the canon to reach their
lying the canon to interpret
congressional awareness of
on.[24] And all of the cases
o in an attempt to ascertain

U.S. 428, 432 (1941); *FCC* v.
California, Inc., 311 U.S. 132,

, 115 F.2d 709, 711 (2d Cir.),
e court rejected application of the
important" factors. In *Georgia* v.
1973), the Court, as a matter of
ier interpretation of identical lan-
decision on the presumption that
ng.

U.S. 575, 581 (1978), the Court
"a detailed knowledge of the . . .
acted language. In *Georgia*, 411
at the prior judicial interpretation
Congress. *See* Judge Mansfield's
nett v. *Panama Canal Co.*, 475
the court stated that Congress re-
ss" of the prior interpretation and
proval follows "from reenactment
ed)

ad been adopted by

Contrary to Fact, ted" the Relevant Doing Incorporated on" Upholding Im- es.

974 amendments to ' of the provisions are claimed by re-

89, enacted October of amendments and s a "re-enactment" ained no "re-enact- ns 4a, 4b and 9(b). he 1974 legislation; ts base their claims jority admits (J.A. ions were left un-

tion, ignored by the he mere amendment ng the canon of con- *ing* v. *Hallock*, 309 said:

he doctrine that re- cts a settled judicial

the words "standards, s Acts of 1965; *Loril-* egal relief" in the Age *Bennett*, 475 F.2d at intended as permissive *Co.* v. *Shimadzu*, 307 eaning of the statutory

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The requirement of
Congress of errone

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[31] *Jones* v. *Liberty G*
not expect Congress to
court indulges in an e
Welden, 377 U.S. 95,
Club, 315 U.S. 32, 40

force in these cases where the h
cases are not only in error but in
stitutional principles. The major
the basis of congressional silence
error "on the shoulders of Congr

**E. The Majority Erred in Hol
gress Consciously Decided
Interpretation Had Recogn
Action for Damages Under
and Intended to Preserve a**

Even if the pre-1974 cases relied
been sufficient in numbers, sufficie
adequately reasoned to support a
was "settled" law, the canon relie
applied if there is a clear showin
(1) knew about those decisions,
state a definite and conclusive in
(3) regarded them as upholding
those asserted in the present cas
assumptions.[32] Every case cited b
the canon to construe ambigu
supported its decision with cle
sional awareness of the prior
ample, in *Georgia* v. *United S*
n.5 (1973), this Court cited at
gressional discussion and cons
prior interpretation.

**1. No clear evidence suppo
1974 Congress was aware
believed that the existence**

[32] *See SEC* v. *Sloan*, 436 U.S. 103,
Board of Commissioners of Sheffield
(1978); *City of New York* v. *Sape*
Zenith Radio Corp. v. *Hazeltine Re*
(1971); *Jones* v. *Liberty Glass Co.*,
Girouard v. *United States*, 328 U.S.
Reynolds, 313 U.S. 428, 432-33 (194

> of action for damages had been "
> erroneous pre-1974 decisions, or tha
> proved and affirmatively enacted the
> erroneous decisions.

In support of its assertion of "the se
that [the 1974] Congress knew the cour
ing private rights of action" (J.A. 141), the
almost exclusively on a few statements scatte
House Report and House debate which se
the effects of private actions against exchange
These isolated references to private actions a
provide no evidence that Congress was awa
tions against *brokers* under Sections 4a, 4b a

In addition to the criticisms of private act
changes, the majority points to a small nu
references to unidentified lawsuits and to c
the House hearings to the fact that com
access to the courts. (J.A. 142). The most
for these vague references is that they infe
that market participants and contract m
immune from lawsuits. With the excepti
reference to *Deaktor* in a letter to a House C
is no evidence that Congress was aware of
1974 cases or any other lawsuit brought und
of the CEA. But in any event the assertion
isolated and undocumented references are
tablish that Congress was aware of, duly
approved the construction given various p
CEA by some lower federal courts is wholly
SEC v. *Sloan*, 436 U.S. at 121; *Rivers* (J
Judge Mansfield points out in his dissent

> "The legislative history of [the 1974
> which runs into hundreds of pages of co
> testimony and debates, fails to contai
> proving a private right of action, desp
> a couple of witnesses and a Senator
> (J.A. 174-75).

The majority places great reliance on the proviso of S 2(a)(1) of the CEA as support for its contention that th Congress approved the private rights of action which ha erroneously implied prior to 1974. (J.A. 152-56). Thi viso reads: "Nothing in this section shall supers limit the jurisdiction conferred on courts of the U States or any State."

As Judge Mansfield points out (J.A. 236-40), this ment is a plain distortion of the legislative record. gressman Rodino—the sponsor of the proviso—made in his Senate testimony that the provision was intend preserve federal and state courts' jurisdiction to hear c which did not arise under the CEA such as ordinary co claims or actions for violation of other federal statutes ticularly, the anti-trust laws. In addition, Congres Rodino was concerned that Section 201 of the bill, as w might bar judicial review of CFTC decisions on comm matters. As Judge Mansfield wrote:

> "Given the reasons expressly advanced by Cha Rodino and given that no witness indicated that t vision of §201 was intended to preserve or even any private rights of action in federal courts, th dence is overwhelming that Congress simply took u task of correcting the problem noted by Chairman R and others and had no intention of approving a p damage action. Had Congress intended to preserve diction of the federal courts over private suits it easily have said so, as it did in §6c when it granted fe jurisdiction to hear CFTC-initiated injunctive suit in §14(f) when it provided for such jurisdiction t force judgments arising out of reparations proceedi (J.A. 239).

Moreover, this argument confuses the question wh respondents have an implied cause of action for dam under the CEA with the question whether the federal c have jurisdiction to hear any cause of action under the *See Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979) (

question whether a cause of action exists is not a question of jurisdiction. . . .") Even assuming *arguendo* that the majority's contention relating to the preservation of jurisdiction is correct, whether pursuant to congressional design the respondents have an implied cause of action for damages under the CEA is a different question:

> "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition *who may enforce them and in what manner.* For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions . . . or other public causes of actions. [citations] In each case, however, the question is the nature of the legislative intent informing a specific statute. . . ." *Davis* v. *Passman,* 442 U.S. 228, 241 (1979).

As this Court emphasized in *Redington,* 442 U.S. at 577, a jurisdictional provision: "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." *See Amtrak,* 414 U.S. at 455-57 ("In terms, §307(a) purports only to confer jurisdiction, not to create a cause of action.").[38]

2. There is no evidence that Congress intended to incorporate a private right of action in the CEA by

[38] The majority relies on certain statements of Senator Dick Clark and law professor Roy A. Schotland in arguing that this proviso was intended to preserve the implied right of action which some courts had incorrectly read into the Act prior to 1974. (J.A. 143-44). However, citation of these statements only underscores the fact that Congress specifically chose not to provide such a right. Mr. Schotland's statement calls for "explicit language" establishing a private right of

(footnote continued on next page)

rence to the Securities Acts especially in view he fact that key provisions in those Acts were rely omitted from the CEA.

ority opinion asks whether "Congress was not assuming" that the decisions under the securities ng private rights of action "would be followed t to the CEA."[34] (J.A. 116). Asserting that from into the 1970's "there was widespread, indeed al- al, recognition of implied causes of action for nder many provisions of the Securities Exchange 113), the majority invokes *Cannon*, 441 U.S. at the proposition that the "evaluation of congres- on . . . must take into account its contemporary t." (J.A. 157).

however, concerned Title IX of the Education ts of 1972 which was intentionally patterned after the Civil Rights Act of 1964 which had been in- as providing a cause of action ("We are only 3 letter word 'sex' to existing law." 117 Cong. (remarks of Senator Bayh)). As Justice Stevens he drafters of Title IX *explicitly assumed* that e interpreted and applied as Title VI had been

ntinued from previous page)

enator Clark's statement expresses the hope that both the ressed by Congressman Rodino and the failure to provide ights of action "can be corrected in the Senate." A fair e proviso as enacted demonstrates that Congress took up rrecting the problem pointed out by Congressman Rodino ng to go further to provide for private damages actions.

ongress may have been justified in assuming is, of course, The germane inquiry is what Congress in fact assumed l. "[W]hat must ultimately be determined is whether tended to create the private remedy asserted." *Trans-* U.S. at 15-16.

" *Cannon*, 441 U.S. at 696 (emphasis added).[35] Indeed, evidence of legislative intent was so "compelling" that Court had "no hesitation in concluding that even the test used by Mr. Justice Powell . . . is satisfied in this case." at 703 n.34). *Cannon* specifically disavows reliance on a umption that the "legal context" justified congressional f that a cause of action would be inferred by the courts refers only to analogous legislation which had been duly idered by Congress.

it the Congress in 1974 gave no indication that it ex- ed the CEA to be interpreted, with respect to the issue ctions for damages, by analogy to the Securities Acts. eover, Congress had no reason to believe that the reason- of the cases decided under the Securities Acts applied to CEA. See pages 22 to 24 of this brief.

ntral to the "contemporary legal context" of decisions ying private rights of action under the Securities Acts d upon by the majority is the now discredited notion "it is the duty of the courts to be alert to provide remedies as are necessary to make effective the con- sional purpose." *J. I. Case* v. *Borak*, 377 U.S. at 433. he 1974 Congress is to be presumed to have considered "contemporary legal context" in enacting the CEA, it t also be presumed to have understood that this context luded the implication of a right of action for damages re any need for such a remedy was *expressly* satisfied.[36] eover, as Judge Mansfield points out, the "contemporary l context" with respect to the willingness of federal

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Justice Stevens further pointed out:

"because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon*, 441 U.S. at 697-98.

See pages 30 to 31 of this brief.

private rights of action was not at all

ity overstates the extent to which courts
mplying causes of action, ignoring such
eeldin v. *Wheeler*, 373 U.S. 647 (1963);
. v. *United States*, 359 U.S. 464 (1959);
Dakota Utilities Co. v. *Northwestern Public*
341 U.S. 246 (1951); *General Committee* v.
., 320 U.S. 323 (1943); *General Committee*
Pacific Co., 320 U.S. 338 (1943); *Switch-*
v. *National Mediation Board*, 320 U.S. 297
which rejected such claims of private rights.
the area of securities, the courts denied
s of action. *E.g., Colonial Realty Corp.* v.
., 358 F.2d 178 (2d Cir.), *cert. denied*, 385
966); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d
(J.A. 217).

addition to *Amtrak, supra*, which was de-
nactment of the 1974 amendments, demon-
ontemporary legal context, even if consider-
ongress, was not so uniform and compelling
Congress reason to assume that the federal
ndertake to supply a private right under
in any event the federal courts are not
n fact are constitutionally prohibited from
gress in its refusal to confront these hard
non, 441 U.S. at 743 n.14 (Powell, J., dis-

974 Congress did not assume or approve of
ce of private causes of action is demon-
the actions which it took.

ted at pages 24 to 31 of this brief, the
the CEA enacted in 1974 are clearly in-
an intent to approve a private right of
ges.

CLUSION

at the decision of the Court below
se of action for damages against
nts exists under Sections 4a, 4b
Exchange Act is erroneous and

Respectfully submitted,

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Inc.

ction 7, clause 2:

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section 1:

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